No. 87-1031

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED*

Should the Court deviate from the normal practice of borrowing the most analogous state limitations period and apply the six-month limitations period for filing charges under the National Labor Relations Act to a free speech claim brought under Title I of the Labor-Management Reporting and Disclosure Act?

* In addition to the parties listed in the caption, Fred A. Hardin, K. R. Moore and J. L. McKinney appear as respondents.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes

Treatises

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 828 F.2d 1066

(4th Cir. 1987), and appears at pages 48a - 70a of the Appendix to the Petition for Writ of Certiorari. ("Pet. App. 48a - 70a") The District Court's Order denying Summary Judgment and staying proceedings pending interlocutory appeal is reported at 633 F.Supp. 1516 (W.D. N.C. 1986), and appears in pertinent part at Pet. App. 1a - 45a. The District Court opinion and order appears in its entirety at pages 42 through 68 of the Joint Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on September 17, 1987. The Petition for Writ of Certiorari was filed on December 16, 1987, and was granted on March 7, 1988. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action involves rights protected by 29 U.S.C. § 411(a)(2) which reads in pertinent part:

> Every member of any labor organization shall have the right to meet or assemble freely with other members; and to express any views arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting . . . .

The action is brought pursuant to 29 U.S.C. § 412 which provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal

office of such labor organization is located.

At issue in the case is the applicability of 29 U.S.C. § 160(b) which reads in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

STATEMENT OF THE CASE

A. Facts

Petitioner G. P. Reed works in the body shop of the local bus company in Charlotte, North Carolina. The bus company's employees are represented in collective bargaining by Local 1715 (the "Local") of respondent United Transportation Union ("UTU"). Beginning in 1967, and continuing through the time this action was filed, petitioner served as the elected Treasurer/Secretary of the Local. Petitioner, like a number of the Local's officers, received a small monthly salary from the Local. However, because their union duties sometimes require union officers to take time off from work without pay, petitioner and other union officers received, in addition to their

salaries, reimbursement by the Union for such lost time.

The dispute in this case followed several heated disagreements over union policy between petitioner and Fred Warlick, the Local's General Chairman. Several weeks after a particularly heated disagreement in August of 1982, petitioner was notified that respondent J. L. McKinney would conduct an audit of the Local's books and records maintained by petitioner. J. A. 28-29. As a result of this audit UTU demanded that Reed return $1,210.20 in payments which he had received for extra time he had spent on union business. Although the Local had approved these payments to Reed, respondent McKinney maintained that petitioner had followed incorrect procedures in obtaining this approval

of payments to him.[1] J. A. 29. In addition, another union member who had expressed concern that he too might be required to return lost time payments was reassured by Telphia Beatty, the Vice Chairman of the Local, that he need not worry because "they were after" petitioner Reed. J. A. 36. Indeed, in the letter prepared at respondent Moore's request setting up the audit of the Local's books, the chief auditor told respondent McKinney that Warlick and petitioner had "a feud going" and that Reed was criticizing Warlick to union members for "spending too much money". Respondent McKinney's

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1 Consistent with past practice, petitioner had obtained the Local's approval for reimbursement before the money was paid, but after having taken time off from work. Respondents asserted that petitioner should have obtained union approval before taking time off.

instructions were to "take care of the assignment". J. A. 28-30.

Petitioner appealed from the repayment order. On October 1, 1982, respondent Hardin, a political ally of Warlick, denied the appeal. J. A. 33. After this appeal, evidence continued to surface which showed that petitioner Reed had indeed been subjected to singular adverse treatment because of his opposition to respondent Warlick. When petitioner sought to apply the same policy and withhold lost time payments from other union officials who had not precleared their "lost time" prior to taking it, he was ordered to make the payments. J. A. 30. Respondent Hardin's only explanation for this difference in treatment has been that the payments

to others are not "costly items".[2]

B. Proceedings Below

On August 2, 1985, petitioner commenced this action in the United States District Court for the Western District of North Carolina. He raised claims under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et. seq. ("LMRDA") as well as pendent state contract and quantum meruit claims. With regard to his LMRDA count, Reed claimed that respondents had violated his rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper

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2 Although this discrimination against petitioner continued until 1985, petitioner would be unable to sue to recover the $1,201.20 that he was required to repay in 1982 if the six-month limitations period is upheld.

disciplinary action. He claimed that the selective application of a "prior approval" policy to disallow his claims for services rendered to the union was meant to punish him for speaking out against the policies and practices of General Chairman Warlick. In addition, petitioner raised claims under 29 U.S.C. § 501 that are no longer at issue.

The respondents filed a motion to dismiss the complaint or in the alternative for summary judgment, on the ground that the complaint was untimely. The trial court determined that the appropriate limitations period for a Title I claim was the three-year North Carolina statute governing personal injury and entered an order denying the respondents' motion to dismiss with regard to the 29 U.S.C. § 411 and the pendent state claims. The court certified the case

for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed the proceedings pending resolution on appeal.

The primary issue raised by the respondents in the court of appeals was again whether the six-month statute of limitations provided by § 10(b) of the NLRA, 29 U.S.C. § 160(b), applied to a freestanding LMRDA "Bill of Rights" claim. While the trial court had rejected this argument, the court of appeals granted the interlocutory appeal and reversed. Reed v. United Transportation Union, 828 F.2d 1066 (4th Cir. 1987). In its opinion, the Fourth Circuit recited the conflicting opinions of the other circuits which had reviewed the issue subsequent to this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S.

151, 103 S.Ct 2281, 76 L.Ed.2d 476 (1983), adopted the reasoning in Steelworkers' Local 1397 v. United Steelworkers of America, 748 F.2d 180 (3rd Cir. 1984), which had held that the six-month limitation of § 10(b) of the NLRA applied to Petitioner's LMRDA claim, and concluded that Reed's LMRDA claim was untimely.

This Court granted certiorari on March 7, 1988.

SUMMARY OF ARGUMENT

The decision below should be reversed because, instead of taking to heart this Court's caution that the exception created in DelCostello "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law as elsewhere", DelCostello, 462 U.S. at 171, the court below disregarded that warning and improperly extended the

exception. Indeed, if the rationale used below to apply the six-month limitations period to a Title I claim was applied consistently, it would require the use of a similar limitations period for virtually all federal labor actions, thereby turning the exception into the general rule.

In DelCostello, this Court set out the relevant considerations which must be met before a court should depart from the practice of borrowing the most analogous state limitations. Given the longstanding nature of this practice, the federal courts have assumed that Congress, which is aware of this practice, intends to follow it when enacting legislation which includes no specific limitations period to a cause of action.

The limited exception to this general rule, which the Court

enunciated in DelCostello, has two parts with the second part again branching into two components. First, there must be "a rule from elsewhere in federal law [which] clearly provides a closer analogy than available state statutes." Second, "both the federal policies at stake and the practicalities of litigation [must] make that [federal] rule a significantly more appropriate vehicle for interstitial lawmaking". DelCostello, 462 U.S. at 172 (emphasis added).

Because the cause of action here satisfies neither part of the DelCostello exception, there is no reason to depart from the norm of borrowing state limitations of actions. First, with regard to the analogy aspect of the DelCostello standard, this Court has recognized that rights granted by Title I of the

LMRDA are modeled after and parallel the individual civil rights protected by the Federal statutes and the Constitution. United Steelworkers v. Sadlowski, 457 U.S. 102, 109-10 (1982); Finnegan v. Leu, 456 U.S. 431, 435-36 (1982). This Court has also recognized that the state statute of limitations governing personal injury claims is to be applied to such federal civil rights claims. Goodman v. Lukens Steel Company, ____ U.S. _____, 96 L.Ed.2d 572 (1987)(42 U.S.C. § 1981); Wilson v. Garcia, 471 U.S. 261 (1985)(42 U.S.C. § 1983).

The Court in Wilson specifically determined that this personal injury analogy is "persuasive". A civil rights violation is an injury to the person or to "the federal statutory rights which emanate from or are guaranteed to the person". Thus, a

violation of a civil right "results from personal injuries". Wilson, 471 U.S. at 278.

With regard to the second aspect of the DelCostello exception, both the federal policies at stake and the practicalities of litigation support the use of state personal injury limitations. These limitations periods, usually two to four years, far better accommodate both the federal policies underlying Title I and the practicalities of litigating a civil rights action than does the six-month administrative limitation contained in the NLRA. Burnett v. Grattan, 468 U.S. 42 (1984). As noted in Burnett, the dominant characteristic of civil rights actions is that "they belong in court" and that the practicalities of federal civil rights litigation require substantially longer

preparation time than is provided by a six-month administrative limitations period. Burnett, 468 U.S. at 50-51.

Thus, this Court's prior decisions indicate that the normal borrowing rule, not the DelCostello exception, should apply in this case.

ARGUMENT

A. THE DELCOSTELLO DEPARTURE FROM THE LONGSTANDING PRACTICE OF BORROWING LIMITATIONS PERIODS FROM STATE LAW IS AN EXCEPTION TO A WELL-ESTABLISHED RULE

Until this Court's decision in DelCostello, the only exception to the general rule that the analogous state statute of limitations was to apply to a federal civil claim was for the narrow class of cases where use of the state law would frustrate the federal policy embodied in the claim. Occidental Life Insurance v. EEOC, 432 U.S. 355 (1977). Accord,

McAllister v. Magnolia Petroleum Company, 357 U.S. 221, 226 (1958)(application of two-year statute of limitations to seaworthiness claim would diminish seaman's mandatorily joined Jones Act claim). See Holmberg v. Armbrecht, 327 U.S. 392 (1946)(the doctrine of laches rather than a state limitations period applies to federal equity action).

The Court recently has advanced several theoretical bases for the use of state statutes of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 158-62, 174-75 (opinions of Justice Brennan for the majority and Justice O'Connor, dissenting); Agency Holding Corporation v. Malley-Duff & Associates, ____ U.S. _____, 97 L.Ed.2d 121, 127-28 and 135-39 (1987)(opinions of Justice O'Connor

for the majority and Justice Scalia, concurring). All of these discussions recognize that the Court has a "longstanding practice of borrowing state law", that Congress is aware of the longstanding practice, and that Congress intends by its silence on a limitations period to allow the practice to continue.

DelCostello represented this Court's second attempt to establish the correct limitations period for a hybrid action combining the statutory § 301 claim, that the employer had breached a collective bargaining agreement, with the judicially-created claim that the union had breached its duty of fair representation. In Mitchell v. United Parcel Service, 451 U.S. 56 (1981), the Court determined that this hybrid action was best

characterized as one to vacate an arbitration award and that the appropriate limitations period was 90 days for the bringing of an action to vacate such an award. The Mitchell decision did not affect the Court's determination in Auto Workers v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966), applying the statute of limitations for unwritten contracts to a straightforward § 301 action by a union against an employer.

Justice Stewart, in his concurrence to Mitchell, pointed out several problems with the Court's result, which would later resurface in DelCostello. Initially, Justice Stewart noted that the hybrid § 301/unfair representation action in Mitchell, unlike the straightforward § 301 claim in Hoosier Cardinal, implicated the core component of

federal labor law, "the formation of the contractual agreement and the private settlement of disputes under the agreement." Moreover, Justice Stewart pointed out that while having discrete jurisdictional bases and different elements of proof, the § 301 claim against the employer and the duty of fair representation claim against the union were "inextricably interdependent." Mitchell, 451 U.S. at 66-67.

This Court in DelCostello recognized that the problems enumerated by Justice Stewart in his Mitchell concurrence were compounded by the fact that the conceptual differences between the § 301 claim and the duty of fair representation claim make it extremely difficult to find a close analogy in state law for a hybrid § 301/unfair representation action. DelCostello, 462 U.S. at

165. The alternative of applying different statutes of limitations to the individual claims did not take into account the practicalities of the hybrid § 301/unfair representation litigation, for under such an approach the use of the most analogous statute of limitations for the § 301 claim against the employer and separate use of the most analogous limitations period for the duty of fair representation claim against the union would have meant that a large part of the damages in most cases would have been uncollectible unless the hybrid action was brought within the shorter statute of limitations. DelCostello, 462 U.S. at 168.

Given these factors, the exception which DelCostello fashioned to the longstanding practice of borrowing state statutes of

limitations was narrowly tailored to the unique set of circumstances presented by the hybrid § 301/unfair representation action. Resort to state law remains the norm unless "a federal law clearly provides a closer analogy than available state statutes" and additionally, both the "federal policies at stake" and the "practicalities of litigation" make the federal rule "a significantly more appropriate vehicle for interstitial lawmaking". DelCostello, 462 U.S. at 172.

The federal limitations period for which the DelCostello exception was crafted was the six-month administrative limitation on the filing of unfair labor practice charges before the National Labor Relations Board (NLRB), which is found in § 10(b) of the National Labor Relations Act (NLRA).

This Court's acceptance of the § 10(b) limitations period as a closer analogy than possible state limitations was premised on the fact that breaches of the duty of fair representation were in most, if not all, cases also unfair labor practices. Thus, there was a substantial overlap of claims constituting both an unfair labor practice and a breach of the duty of fair representation, DelCostello, 462 U.S. at 170, and use of the § 10(b) limitation met the first element of the Court's test.

The second element was also satisfied since the six-month limitation of § 10(b) of the NLRA struck a reasonable balance between, on the one hand, the national interest in stable bargaining relationships and the finality of private settlements, and on the other

hand, the employee's interest in the hybrid § 301/unfair representation case to set aside unjust settlements. Additionally, the Court concluded that the § 10(b) limitation took into account the practical concern that the interdependent claims share a limitations period of suitable length. DelCostello, 462 U.S. at 171.

Although the federal limitations contained in § 10(b) of the NLRA fit the unusual exigencies of DelCostello, both the analysis in the opinion as well as the specific admonitions of the Court were clear: the holding in DelCostello was not to "be taken as a departure from prior practice in borrowing limitation periods for federal causes in actions in labor law or elsewhere . . . . Resort to state law remains the norm

for borrowing limitations periods." DelCostello, 462 U.S. at 171.

B. CLAIMS UNDER TITLE I OF THE LMRDA DO NOT FIT WITHIN THE NARROW EXCEPTION OF DELCOSTELLO OR THE SUBSEQUENT EXCEPTION OF AGENCY HOLDING CORPORATION

1. The Limitations Period of § 10(b) of the NLRA Does Not Clearly Provide a Closer Analogy Than Available State Statutes.

The initial inquiry regarding whether a Title I action should, like the hybrid action in DelCostello, be an exception to the general rule is whether federal law "clearly" provides a closer analogy than available state statutes. The court of appeals below, as well as the other courts that have extended DelCostello to Title I actions, have not focused on the specific analysis in DelCostello to determine if federal law clearly provides a closer analogy. Rather, they have seized on

this Court's passing reference that unfair representation claims bear a "family resemblance" to unfair labor practice claims to create a generalized "family resemblance" standard for determining the applicability of DelCostello to Title I claims. The leading decision applying the § 10(b) limitations found such a family resemblance between an unfair labor charge and a Title I action on the generalized notion that both are concerned with arbitrary actions by Unions. Local Union 1397 v. United Steelworkers, 748 F.2d 180, 183 (3rd Cir. 1984). The opinion of the court below contained a similar generalized notion of family resemblance. Reed, 828 F.2d at 1070.

The First Circuit had a succinct and dispositive response to this proposition:

> This, we feel, is to stretch the rubric of 'family' far beyond its sense in DelCostello, where the term was used to indicate a dramatic overlap of equivalency situations in which a charge of unfair representation breach of a collective bargaining agreement would 'also amount to' unfair labor practices'. The fact that because the NLRA and the LMRDA endeavor to protect workers from unfair treatment, they must be deemed to bear a 'family resemblance' is no more a unifying perception than the fact that both tort and contract law purport to protect against unreasonable actions.

Doty v. Sewall, 784 F.2d 1, 9-10 (1st Cir. 1986)(citations omitted).

The facile invocation of a family resemblance test to create the analogy between Title I actions and unfair labor practices under the NLRA also overlooks the historical development of federal labor law. Title I came into being because

Congress was dissatisfied with the failure of the NLRA, even as amended by the LMRA, to regulate internal union affairs and protect union members from undemocratic abuses by their leaders. See generally McAdams, Powers and Politics in Labor Legislation (1964). See also Boilermakers v. Hardeman, 401 U.S. 233, 237-41 (1971); Doty, 784 F.2d at 4. Indeed, the only cases which are covered by Title I and are also considered unfair labor practices under the NLRA are those in which the union causes a member to be discharged or otherwise injured by the employer. E.g., Murphey v. Operating Engineers Local 18, 774 F.2d 114, 123 (6th Cir. 1985). This convoluted and devious means of retaliating against a union member for exercising his right within the union is not the conduct at issue in

this case or most Title I cases.

While Congress had in mind the shortcomings of the NLRA when enacting Title I for the LMRDA, it chose not to adopt the limitations period of § 10(b). For the federal courts to now impose such a limitation on the basis of a strained "family resemblance" between the two claims would lead to a brand of judicial intrusion into the legislative process not anticipated by this Court in DelCostello or in Agency Holding Corporation v. Malley-Duff and Associates, _____ U.S. _____, 97 L.Ed.2d at 142.[3]

3 The duty of fair representation claim which was an element of the hybrid action in DelCostello was a judicially-created cause of action implied from the NLRA. Ford Motor Company v. Hoffman, 345 U.S. 330, 337-38 (1953). Thus, the court action in applying the § 10(b) limitation of the NLRA to the hybrid action does not constitute the kind (Continued on page 32)

Indeed, if there is any "family resemblance" here, the proper sibling to a Title I claim is not an unfair labor practice claim but rather a civil rights claim. Title I of the LMRDA is often referred to as the "Bill of Rights" for union members. The legislative history of Title I is replete with statements explaining the relationship between Title I and the Federal Bill of Rights. For instance, Senator McClellan noted that Congress "should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life." 2 NLRB, Legislative History of the Labor Management Disclosure and Reporting Act 1103 (1959). Toward the close of debate on the final

3 (Continued from page 31) of intrusion that a similar application to a Title I action would entail.

version of Title I, Representative Griffin emphasized that the rights protected by Title I "are hardly new or novel--they are the essential and fundamental rights which every American citizen is guaranteed in the Bill of Rights of the Federal Constitution". Id. at 1566.

This Court has likewise recognized that Title I rights are parallel to rights afforded by the Federal Constitution and that the Bill of Rights of the LMRDA provides a protection "necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of the memberships". Finnegan v. Leu, 456 U.S. 431, 435-36 (1982). The fact that Title I provides civil rights analogous to the rights protected by 42 U.S.C. § 1983 was recognized by

the courts of appeal well before the DelCostello decision. See, e.g., Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771, 774 (4th Cir. 1978). The cases which have correctly refused to expand the Delcostello exception have also placed LMRDA claims in the federal civil rights category and have applied state personal injury limitations. Rodonick v. House Wreckers Union Local 95, 817 F.2d 967, 977 (2nd Cir. 1987); Doty, 784 F.2d at 6. These decisions are consistent with this Court's recent decisions recognizing that state statutes of limitations governing personal injury are appropriately analogous to both 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Goodman v. Lukens Steel, _____ U. S. _____, 96 L.Ed.2d 572 (1987); Wilson v. Garcia, 471 U.S. 261 (1985).

The Court in Wilson found this personal injury analogy "persuasive", for a civil rights violation is an injury "to the person" or to "the federal statutory rights which emanate from or are guaranteed to the person". Wilson, 471 U.S. at 278. Thus, a violation of a civil right "results from personal injuries". Id. Given the persuasive analogy of civil rights actions similar to those under Title I to personal injury actions, and the lack of a true "family resemblance" between the Title I action and the federal unfair labor practice claim, the first part of the DelCostello exception for departure from the norm of borrowing state limitations periods has not been satisfied. There is no federal rule that clearly provides a more analogous limitations period for a Title I claim.

2. The Federal Policies At Stake In A Title I Action Do Not Require Use Of The DelCostello Exception.

Likewise, neither the federal policies at stake in a Title I action nor the practicalities of Title I litigation make the six-month limitation of § 10(b) of the NLRA "a significantly more appropriate vehicle for the Court's interstitial law making."

The Congressional purpose in enacting Title I was to remedy the fact that unions were not adequately protecting vital non-economic interests of their members and that members needed protection from autocratic abuse by union officials. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526, 536-37 (1984);

Doty v. Sewall, 784 F.2d 1, 4 (1st Cir. 1986). The courts of appeal that have applied the § 10(b) limitation to Title I actions, however, have given short shrift to the civil rights purpose of Title I. These courts have failed to identify any real impact that Title I actions have on the core federal policies embodied in both the LMRA and NLRA, the formation of the collective agreement and the private settlement of disputes under the agreement. Rather, they have simply found a "similarity in policy considerations [between] . . . . Title I actions and unfair labor practice charges." Local Union 1397 v. United Steelworkers, 748 F.2d 180, 183 (3rd Cir. 1984).

This conclusion is based on the generalized notion that "rapid resolution of internal union disputes

is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's effectiveness in the collective bargaining areas". Local 1397, 748 F.2d at 184. As both the First Circuit in Doty and the Eleventh Circuit in Davis have noted in response to this ipse dixit, "this link appears rather tenuous in the situation of a single dispute between an individual union member and the union." Doty, 784 F.2d at 10 (quoting Davis v. Automobile Workers, 765 F.2d 1510, 1514 n.11 (11th Cir. 1985)).

Certainly this case, presenting a freestanding claim that arises from disputes within the union and is in no way related to the formation of the collective bargaining agreement or to resolution of disputes under

the agreement, lends no support to the Local 1397 reasoning. The legislative history discussed earlier suggests that this is the type of claim which Title I is designed to remedy. While some of the issues giving rise to freestanding Title I claims, such as the use of union funds or the tactics and policies of union leadership, etc., may indirectly affect the way a union approaches the collective bargaining process, a similar indirect effect would result from every case brought against a union under any legal theory.

For example, challenges to union trusteeships under Title III of the LMRDA, are often related to disputes between a local and international union about bargaining matters. See, e.g., Roland v. Air Line Employees, 753 F.2d 1385 (7th Cir. 1985)(proper

purpose for trusteeships is to assure performance of bargaining agreements and bargaining duties). Yet Congress has included within Title III a presumption of proper motive for trusteeships during the first eighteen months of their imposition. This eighteen-month presumption indicates that Congress, having insured that union members are not in a position to effectively challenge a trusteeship until well after the six-month § 10(b) limitation has run, was aware that actions under Title III would be brought beyond the § 10(b) period.

Likewise, a civil rights action filed by a member against a labor union under 42 U.S.C. § 1981 may have an indirect impact on a union's position in the collective bargaining process; however, this Court has recognized that the appropriate

limitation for a § 1981 action is the state limitation for personal injury.

Thus, both Congress and this Court have recognized that a short six-month administrative limitations period is not needed to protect the collective bargaining process where the effect on the process is at most an indirect one brought about by a challenge to the internal action of the unions in violation of members' statutorily-protected rights.

There are situations where the union member may have both a hybrid § 301/unfair representation claim resulting from the manner in which the employee and the union engaged in a specific dispute resolution, as well as a Title I claim resulting from the fact that the union's disinterest in the grievance was by design to squelch protected activity within the union. Clift v.

International Union, UAW, 818 F.2d 623 (7th Cir. 1987); Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985); Vallone v. Local 705, International Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984). Similarly, there are times when a union member may seek relief under both a hybrid § 301/unfair representation claim and a claim of race or national origin discrimination where the failure to assist with a grievance had a discriminatory motivation. Henry v. Radio Station KSAN, 374 F.Supp 260 (N.D. Cal. 1974).

The fact that after DelCostello any union member who wishes to file an action combining his hybrid § 301/unfair representation claim with a claim under Title I, 42 U.S.C. § 1981 or Title VII of the 1964 Civil

Rights Act must do so within the limitations period for the hybrid claim does not suggest that the limitation for filing the other civil rights claims must be shortened. Rather, the policies underlying each of these claims, as well as the tangential impact each has on the federal policy to encourage collective bargaining and the private settlement of disputes under it, requires a separate analysis in determining the proper limitations period for each claim.

That the DelCostello exception was not to apply to every labor claim which even indirectly affected the collective bargaining process is highlighted by the fact that in DelCostello this Court specifically reaffirmed its holding in Auto Workers v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966). In

Hoosier Cardinal, the Court applied the statute of limitations for suits upon unwritten contracts to a suit brought by a union against an employer for violation of a collective bargaining agreement. Certainly the outcome of litigation involving the bargaining agreement itself may influence the way in which either party to the agreement bargains upon the contested issues in the future and may affect the relative strength of a party's position in the negotiation of future agreements. Yet DelCostello noted that, in applying a state statute of limitations, the court in Hoosier Cardinal had not implicated the "'consensual process'" defined as "'the formations of the collective agreement and the private settlement of disputes under it'". DelCostello, 462 U.S. at 163.

As with the § 301 claim in Hoosier Cardinal, the fact that some day in some way a union member's claim may affect collective bargaining falls far short of requiring imposition of the DelCostello exception to a Title I claim. Doty, 784 F.2d at 10.

Courts of appeal have reached a similar conclusion when considering the appropriate limitations period for actions under § 303 of the LMRA to enforce the secondary boycott provisions of the NLRA. Monarch Long Beach Corporation v. Teamsters Local 812, 762 F.2d 228, 231 (2nd Cir. 1985); Carruthers Ready-Mix v. Cement Masons Local 520, 779 F.2d 320, 325-27 (6th Cir. 1985). These courts rejected the DelCostello exception and applied longer limitations periods even though labor-management relations are directly affected by

such suits, and even though a secondary boycott, like the breach of duty of fair representation discussed in DelCostello, is an unfair labor practice. Nevertheless, these courts applied the DelCostello analysis to conclude that § 303 litigation did not have a sufficient impact on the bargaining relationship to warrant departure from the normal rule of borrowing state statutes of limitations.

In summary, important federal policy has led Congress to protect the vindication of a union member's civil and political rights with the passage of Title I. The prosecution of a Title I claim and the vindication of these rights have at most an indirect effect on the general federal labor policy to protect the formation of the collective agreement and the

settlement of disputes under it. Thus, a reconciliation of these federal policies does not require deviation from the norm of borrowing the appropriate state limitations period for the Title I claim.

3. The Litigation Practicalities Of A Title I Action Militate Against The Application Of The DelCostello Exception.

The practicalities of Title I litigation also militate against application of the DelCostello exception. In DelCostello the Court was faced with a situation where the appropriate state limitation as established by Mitchell generally required filing the hybrid § 301/unfair representation claim within ninety days. The DelCostello court was also assessing claims that had different geneses against two defendants, the union and employer,

which seldom had a similar interest or defense in opposition to the plaintiff's claims. Also, the hybrid claim in DelCostello presented a situation wherein the union could only be liable if the plaintiff's damages had been enhanced by its refusal to act. These circumstances, the DelCostello court found, are appropriate for interstitial lawmaking in the § 10(b) limitation.

However, none of the factors at issue in DelCostello figure into the selection of a limitations period for a Title I action. Prior to the flurry of reconsideration by the courts of appeal following DelCostello, a number of limitations periods had been applied to Title I actions, from one year for a tort action in Alabama, Sewell v. Grand Lodge of International Association of Machinists and Aerospace Workers, 445

F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972), to the ten-year statute of limitations in Louisiana, Dantagnan v. I.L.A. Local 1418, AFL-CIO, 496 F.2d 400 (5th Cir. 1974). Most courts had applied statute of limitations of from two to four years. See, e.g., Copitas v. Retail Clerks International Association, 618 F.2d 1370, 1373 (9th Cir. 1980); Howard v. Aluminum Workers International Union 400, 589 F.2d 771 (4th Cir. 1978); Berard v. General Motors Corporation, 493 F.Supp 1035 (D. Mass. 1980), aff'd without opinion, 657 F.2d 261 (1st Cir. 1980), cert. denied, 451 U.S. 987 (1981). These cases tended to recognize the similarity of Title I actions to civil rights actions brought under 42 U.S.C. § 1983. See, e.g., Copitas, 618 F.2d at 1373; Howard, 589 F.2d at 774.

The Court has specifically recognized that short administrative statutes of limitations for filing charges with a federal agency are unsuited for civil rights actions. Burnett v. Grattan, 468 U.S. 42 (1984). As noted in Burnett, the dominant characteristic of civil rights actions is that they belong in court. Assuring the full availability of a judicial forum necessitates attention to such practicalities of litigation as determining the extent of injury, either securing funds to obtain counsel or preparing to proceed pro se, conducting sufficient investigations to draft pleadings that meet the requirements of the federal rules (including Rule 11), as well as the responsibilities that immediately follow filing the

complaint. Burnett v. Grattan, 468 U.S. at 50-51.

These practicalities are "strikingly different" than those facing a complainant to an administrative agency. Burnett, 468 U.S. at 50-51. Once a union member files an unfair labor practices charge with the NLRB, the agency assigns an agent to investigate the case. The agency's investigation includes the interviewing of witnesses and the use of an informal conference with the parties. The charge may then be disposed of informally or the agency may issue a complaint. 29 U.S.C. § 160(1). Since many of the actions which must be undertaken prior to the filing of a Title I legal action are handled by an agency subsequent to the filing of an administrative unfair labor practice charge, the practicalities

of filing a Title I complaint require a longer limitations period.

Another factor, which may be considered either a practicality of litigation or a pertinent policy consideration, is that the decision to bring an action against union officials is not to be made lightly, for one will always be remembered as the person who challenged the established order. A plaintiff may be well advised to wait in hope that conditions will improve before taking an action that "may have much to do with one's future fate even if one is successful." Doty v. Sewall, 784 F.2d 1, 9 (1st Cir. 1986).

Additionally, there is a societal interest to be gained by allowing a union member time to decide if he is willing to battle the suppression of the rights of individual union members. As noted

by the Doty court, the relief gained by successfully pursuing an action that benefits union democracy benefits not only himself but all union members and the public at large. Doty, 784 F.2d at 9.

In sum, the practicalities of litigating Title I claims again point to the borrowing of the same limitations applied to other civil rights actions, the state limitations for personal injury.

The court's recent decision in Agency Holding Corporation v. Malley-Duff Associates, ___ U.S. ____, 97 L.Ed.2d 121 (1987), simply confirms that the appropriate limitations period for a Title I action should be borrowed from the state limitations for personal injury. In Agency Holding the Court noted that the decision regarding the selection of a limitations period is actually a two-

step process. Initially a court must determine if the claim is one which should always be characterized in the same fashion or if its characterization may vary depending on the varying factual circumstances and legal theories involved. Then a court must determine if the normal course of selecting the applicable state statute is proper. Only in rare instances will an exception like that in DelCostello be appropriate. Id. at 128.

All of the courts which have considered the limitations period for a Title I claim subsequent to DelCostello, whether they applied the § 10(b) limitation or the state personal injury limitation, have recognized that Title I claims should be characterized in the same way for determining the appropriate limitations period.